

GETTING IT RIGHT: TITLE IX'S ROLE IN ADJUDICATING SEXUAL ASSAULT CLAIMS

MARY MARGARET "MEG" PENROSE¹*

I want to start with a very important point: sexual assault is a crime. We have a serious issue in the United States with sexual assault and sexual harassment. We are seeing this play out right now, and I think the "Me Too" campaign has brought important attention to this issue. An issue that impacts not only our college residence halls, but, as we have seen, the halls of Congress. Serious people are not debating whether sexual assault and sexual harassment pose a societal problem. Rather, serious people are debating how to adequately address these issues without compromising fairness to all involved.

Let me also state: I am not a political actor. I am a constitutional law professor. I do not talk about the wisdom of legislation. I talk about whether Congress has the power to pass the laws that it passes. But, one of the things I find a little disconcerting in this area is Title IX, and its interpretation, appears to be a bit of a political football. When a Presidential administration changes, the policy interpretations seem to change. Such political evolutions should trouble all of us since this legislation is intended to ensure gender equity in education.

Slide two, same point: sexual assault is a crime. I think it is equally true that we can hear the victims, listen to the victims, and believe the victims, while simultaneously ensuring that those that are accused of sexual assault have fair process. Title IX was not intended to address criminal offenses, which is why I think we are struggling in this arena right now. For some time, it was not even clear that Title IX provided a private cause of action for sexual harassment. We had to wait until the 1990s for the Supreme Court to find an implied cause of action under Title IX for sexual

* Mary Margaret "Meg" Penrose is a professor at Texas A&M University School of Law where she teaches or has taught Constitutional Law, First Amendment, a Supreme Court Seminar course, Criminal Procedure, and a Criminal Procedure Practicum on Motion Practice. She received her undergraduate degree in History from the University of Texas, Arlington before receiving her J.D. from Pepperdine University, and her LL.M. in International Human Rights from the University of Notre Dame. Professor Penrose has also taught at the University of Oklahoma School of Law and Texas Wesleyan School of Law. Before entering academia, Professor Penrose served as the Staff Attorney to the Honorable Jane J. Boyle and Senior Law Clerk to the Honorable Jerry Buchmeyer, both of the United States District Court for the Northern District of Texas.

harassment.² The *Davis* case that Professor Moore described places potential legal responsibility on schools for peer-on-peer harassment.

Davis requires deliberate indifference to known acts of sexual harassment in a school's programs or activities.³ Many of these instances we are discussing today will fall short of this standard, they will not be known to the schools. Instead, they often involve issues of date rape or assaults that occur off-campus, so these are things we often cannot attribute to the school for deliberate indifference. Title IX has always been intended to give assurance that gender will not be the basis for depriving any individual, male or female, of an educational opportunity. We know that sexual assault can violate Title IX.

Now, I should also share with you I am a product of Title IX. I played college basketball for a Division I institution and received five years paid education. I credit that to Title IX. I am a huge supporter of Title IX, not only its athletic component but also its classroom component. So, this is an issue that is very dear to me. I take it very seriously, and I am able to see the complexities on both sides. The ultimate goal, I believe, should be to have procedures that fairly fulfill a truth-seeking function. If you have children, then you want this to be the case. If you have sons, who are largely the ones being accused of these acts, you want them to receive fair process. If you have a daughter, you want her to be protected and you want her to be heard. So, we all, I presume, want a fair process when the law plays its truth-seeking function.

As we discuss these issue, we must accept we are dealing with young adults and, as was brought up earlier, the very sensitive topics of sexuality, sexual relations, and sexual abuse. Sexual assault and harassment have no place on our college campuses. Any adopted policies cannot shield sexual perpetrators or seek to silence the victims. That is number one; even as we have this conversation. Number two, we need to ensure that we protect the hearing participants, the complainant and the accused, as much as the process. These are our children, which is a very serious issue. We need to strive for fairness over simply checking the Title IX box. Professor Moore talked about the administrative law component. My fear is schools have decided, "We need to check the Title IX box. That is more important than getting it right, because federal funding is at stake." We cannot allow that to happen. Maintaining federal funding cannot be the primary motivator.

I want to go forward and talk about cases that have been decided, actual instances that are percolating in the court, and demonstrate both sides

2. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60 (1992) (addressing sexual harassment committed by teachers); *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999) (addressing peer-on-peer sexual harassment).

3. *Davis*, 526 U.S. at 633.

of what is a very troubling issue. We have numerous examples of our universities failing in situations relating to sexual assault. We see examples in the press, and I am going to show you some examples of case law. Too often, we find that schools are failing both the victims and the accused. If the victim does not get a fair process, he or she does not feel heard. If the accused does not get a fair process, then he or she usually goes to court, seeks to have the decision overturned, and then the victim goes through the process a second time. We need to do better to protect our sons and daughters

I am really grateful to the Belmont Criminal Law Journal for putting on this Symposium. I think this is an important topic, and I think we need to be discussing how we, as a society, do a better job protecting all involved. The goal is to provide a safe campus environment for learning. That is what we all want.

How can we improve Title IX's application? That is part of the theme of this Symposium. I simply seek to further the conversation. I do not claim to have the answers. In fact, I have more questions than answers today and every day that goes forward, because additional cases keep coming up. I do not know how to solve these issues. I'm not sure the courts do either.

Let's first talk about failing the victims. The language I am going to use in the next few slides comes directly from published press reports. East Lansing Michigan. This woman told Michigan State University she was sexually assaulted by "x"— and I have taken the name out — during a visit to his campus office in 2014 for a treatment for hip pain.⁴ This is after the 2011 Dear Colleague Letter. Michigan State told her she was not assaulted. She said "x" cupped her buttocks, massaged her breasts and vaginal area. She said he became sexually aroused. Michigan State's Title IX Office, which investigates gender discrimination claims including allegations of sexual assault and harassment, determined the woman did not understand the nuanced difference between sexual assault and an appropriate medical treatment.

The woman at the time, a recent Michigan State graduate, said she worried the University would not take her complaint seriously. In July of 2014, thirteen months after starting the investigation, Michigan State's Title IX Office dismissed her claim but thanked her for bringing it to their attention. The police investigated as well but the prosecutor declined to issue charges. "They just didn't listen," said the woman, who the journal did not identify because she is an alleged victim of sexual assault. "All of these people. All of these people didn't listen." Jason Cody, the University spokesman, defended [Michigan State's] decision to clear the perpetrator

4. See, Matt Mencarini, *MSU Hid Full Conclusions of 2014 Nassar Report from Victim*, LANSING STATE JOURNAL, www.lansingstatejournal.com/story/news/local/2018/01/26/michigan-state-larry-nassar-title-ix/1069493001/ (2018).

saying, "I think the University made the right decision with the information we had at the time."

Who was the person cleared in this investigation? Who is "x"? Larry Nassar. At the time this story was written Larry Nassar faced three sexual assault charges in state court, three federal child pornography charges, and sex assault allegations from at least fifty women and girls. As of November 2017, he faced twenty-two sexual assault charges, pleaded guilty to the child pornography charges, and faces allegations from at least 140 women and girls. Let me help put this number in perspective: This is three times the number of Jerry Sandusky's victims at Penn State University. Recently, a little over a month ago, Nassar was sentenced in federal court. U.S. District Judge Janet Neff sentenced him to sixty years in prison, with three twenty-year sentences running consecutively. Another sentencing hearing is taking place today. You can just put in "Nassar" on your phone and you will find many of the victims', their parents', and coaches' testimonies because this man was the doctor for the United States gymnastics team.

Here is my question: You want to see the ultimate test of Title IX? What is the Department of Education going to do to Michigan State? Will there be any penalty imposed? We know some of these victims are suing Michigan State for deliberate indifference. We know that potentially federal funding can be taken away, but as we heard earlier that includes access to financial aid, so it would really cripple Michigan State. But if we are seeing all of these universities rush to check the Title IX box, what about Michigan State? And what about all of Nassar's victims, recognizing he was allowed to continue working on campus? How did this happen for so long?

Unfortunately, Michigan State is not alone in its failings. Other schools have faced sexual assault crises, from the Ivy Leagues schools of Yale, Stanford, Columbia, to public schools like Michigan State and Penn State. Title IX was supposed to ensure gender parity in educational opportunities and these sexual assault issues have prevented that from always happening. The handling of these issues shows that most schools are ill-equipped to give adequate support to the victims and ill-equipped to give adequate process to the accused.

I am going to use a quote and I am going to go ahead and give my disclaimer in the beginning. Use of the quote is not intended to be disrespectful of any individual in the process. I am a university professor. I have sat on disciplinary tribunals. I have volunteered to do so. If you have the chance as a student or faculty member, and you care about justice, you should as well. But make sure you are properly trained. I am simply using this quote to remind you that we are having non-legal experts resolve critical issues of intent and evidentiary presumptions in sexual assault cases. If you are a law student and I asked you the difference between preponderance of the evidence and clear and convincing evidence, and said

if you can give me a one paragraph explanation, I will give you an A, chances are, most of you would be respond with: “Hmm? 50 percent versus 75?” Even law students struggle with the issue of evidentiary presumptions. Now imagine non-lawyers.

Many individuals sitting on university adjudication tribunals have no legal background and only minimal training. Why does that matter? Because this risks error. These panels provide a truth-seeking process. So, here is Alan Sash’s quote and his assessment of school processes: “The adjudication of Title IX investigations can be as flawed as the investigations themselves. Those who hear the case typically apply for the role as volunteers. Like the investigators,” Sash says, “the people who adjudicate a Title IX case also may be composed of part-time university employees and, therefore, have a bias. Do you really want the botany professor deciding the issue of intent [in a sexual assault case]?”⁵ This is not a jury of peers. And, most panel members lack the necessary legal training to adequately resolve these issues.

There was a group of law professors that recently discussed this issue in San Diego at the American Association of Law School’s annual meeting. We addressed Title IX from all different angles, considering what we should be doing and what processes should be used. But the one thing we all agreed on is that the training has been insufficient.

Michigan State gives a heart-wrenching example where we failed the victims. We failed to hear them. We failed to protect them. Title IX failings impact both the victims and the accused, so now I am going to shift and talk about the accused.

Yale University, 1977. If we want to ask ourselves, “When did we first see Title IX being used in universities to apply to sexual assault and sexual harassment?” It is not the *Davis* case, it actually predates that. It goes back to 1977. The Yale case even predates the Department of Education, which President Jimmy Carter put into operation on October 17, 1979.

A group of students, former students, and one male professor sued Yale University in Federal District Court.⁶ They did not want money.⁷ They wanted the court to “require that Yale adopt corrective measures, fair processes to deal with its failure to combat sexual harassment of female students and its refusal to institute mechanisms and procedures to investigate sexual harassment that interfered with the educational process and denied equal opportunity in education.”⁸ I know that is a long quote.

5. Virginia Chamlee, *How Michigan State’s Botched Title IX Investigation Enabled USA Gymnastics Doctor Larry Nassar*, BUSTLE, www.bustle.com/p/how-michigan-states-botched-title-ix-investigation-enabled-usa-gymnastics-doctor-larry-nassar-5688630 (2017) (quoting Alan Sash).

6. *Alexander v. Yale Univ.*, 631 F.2d 178 (2d Cir. 1980).

7. *Id.* at 185.

8. *Id.* at 184,

That is what the case says.

Alexander v. Yale was a case where the magistrate issued an opinion and the District Court adopted it in total.⁹ Here is what the magistrate found: “It’s perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII’s ban against sex discrimination in employment.”¹⁰ The Magistrate’s finding, as approved by the District Court, was then upheld by the Second Circuit. And, even though the plaintiffs did not secure legal relief from Yale in this particular case, they helped change the course of Title IX.¹¹

The 2011 “Dear Colleague” Letter, as Professor Moore discussed, was never open for notice and comment.¹² It did not go through the ordinary process. That is problematic. Yet, under the threat of losing federal funding, schools faced a troubling decision, and they had a significant motivating factor: do we adjust to the new standards or do we ignore them? Well, many schools overcorrected, and they jumped on the new standards; whether those standards had force of law became irrelevant. Schools did not sit and listen to individuals like Professor Moore. Instead, they jumped ahead and said, “we need to protect these funding interests.”

But, here is one of the things that really troubled me about that “Dear Colleague” Letter: It changed terminology. Individuals were no longer “complainants” and “accused.” Now they were “victims” and “survivors” versus “perpetrators.” Going into a hearing with these terms attached already assumes guilt. There is an assumption that the individual who has been accused has perpetrated an act. Yet, the whole process of having the hearing is to determine whether the person is a victim and therefore a survivor, and whether the person accused is a perpetrator. That was probably my biggest concern with the Dear Colleague Letter, much more so than even the change to a preponderance of the evidence standard.

Two other significant changes are the preponderance of the evidence standard and a 60-day completion recommendation. The preponderance of the evidence standard is the lowest evidentiary standard used in civil litigation. But, as was set forth in an earlier talk, this standard is commonly used when we are dealing with Title VI and Title VII. We understand the preponderance standard and its use in civil rights litigation. So, I am not as troubled by that change. But I *am* troubled by the sixty-day requirement universities have to complete an investigation, which often

9. *Id.* at 182.

10. *Alexander v. Yale Univ.*, 459 F.Supp . 1, *4 (D. Conn. 1977).

11. See, *Alexander*, 631 F.2d at 186.

12. *Dear Colleague*, U.S. DEP’T EDUC. OFF. OF CIVIL RIGHTS, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (2011).

results in truncated investigations. Here is why this bothers me. Sixty days. Imagine your son is accused of sexual assault and sixty days later he is facing trial. We know that is never going to happen because sixty days just is not enough time to complete an investigation or gather your evidence. Now, in fairness, the 60-day period was a recommendation and the Department of Education was not holding schools to that. But, schools were doing the best they could to stick to that tight deadline resulting in hurried investigations.

I think the current problem remains overcorrection. Secretary DeVos was forced to address the situation caused by overcorrection. I think she had no choice but to provide some sense of resolution. Students were not, and still may not be, receiving fair process consistent with legal standards and governing case law. Let us look at the 2011 Dear Colleague Letter. That letter fails to honor the Supreme Court precedent requiring evidence of deliberate indifference before schools face legal responsibility. A school that is not deliberately indifferent to sexual assault cannot be found culpable or responsible in a court of law. Under the Dear Colleague Letter, the government is saying, “even if you are not deliberately indifferent, we can pull your funding.” That seems to be a disconnect we, as lawyers, should not accept. Disciplined students—who are mostly male in this case—however, are starting to secure legal victories by challenging the procedural unfairness in the school disciplinary process. This overcorrection is having an adverse effect where courts are growing skeptical of the Title IX process. That is a problem for our daughters. So, regardless of which angle you approach this from, I think the overcorrection requires us to come up with some solutions. This is likely what motivated Secretary DeVos.

There remain serious concerns about the process afforded those accused under Title IX. We are still seeing these cases play out in court. But I also want to address FERPA, which is an educational privacy act that protects educational records. FERPA makes assessing procedural fairness difficult because we have limited access to students’ disciplinary records.¹³ I fully support FERPA in protecting educational records, but it does become difficult to figure out if someone is disciplined, whether he or she received similar process in a similar case. To be able to go and look at these cases comparatively becomes almost impossible. If you have an individual in a criminal setting who is sentenced, you can compare those sentences. In contrast, with Title IX disciplinary issues, you usually cannot. Much of the disciplinary process occurs in private, closed settings with records protected under FERPA. Usually, there is no written opinion announcing the judgment, so we do not really know how to compare one student to another. Those of us that are trying to study and see comparative issues to make sure there is not any obvious implicit or explicit biases cannot get the data.

13. 20 U.S.C.A. § 1232(g) (2013).

There is no guidance for penalties. Most school handbooks provide punishment ranges from admonishment to expulsion. But without knowing a school's typical range or process, the handbook provides only limited guidance when I am trying to figure out how to advise a client accused under Title IX.

Under Secretary DeVos's approach, there are new issues that are troubling. Following the Trump Administration's abandonment of the Dear Colleague Letter, the procedures now vary from university to university, including the evidentiary rules. Some schools apply the preponderance of the evidence, some apply clear and convincing. There also remains varying quality of training and composition in disciplinary panels. I liked hearing earlier, I think it was Lipscomb University, that prefers to give in-person training. But a lot of training that people receive is online. If you have taken online training, we all have, we know how that goes. Click, click, and if there is a pretest I am taking the pretest, right? That is a problem because we are talking about serious accusations under Title IX. Further, appellate rights are unusual in the Title IX setting. Punishment can be enhanced if an individual appeals. Your client can go from a one year suspension to expulsion simply by appealing. I am going to briefly describe a couple of reported cases today just so you get an idea of some of the shortcomings we have seen.

In 2015, the University of Davis suspended a person without a hearing.¹⁴ That just seems to fly in the face of due process. As you can imagine litigation ensued. In 2016, Cornell University denied the accused an extension of time, but gave the accuser an extension of time. There were unusual procedures in the hearing itself. The accused was not permitted to ask any questions. Yet, the accuser self-reported how many drinks she had, and the hearing panel used an online blood alcohol calculator to figure out if she was impaired. Again, as you can imagine that went through the litigation process. In 2016, at James Madison University a new, separate sexual assault allegation was raised against the student for the first time on appeal.¹⁵ Importantly, despite this new allegation, the student – who had been found not responsible at the initial hearing – was neither present nor given notice of the proceeding.¹⁶ Once again, litigation. In 2017, Amherst College, the accused was given less than a week to respond to the allegations against him based on sexual assault.¹⁷

14. Dorian Hargrove, *University of California's Skewed Take on Title IX: Judge in Northern California Says Officials Botched Sexual Assault Hearing*, SAN DIEGO READER, <https://www.sandiegoreader.com/news/2015/oct/13/ticker-university-californias-skewed-take-title-ix/#> (2015).

15. Jeanine Martin, *JMU Student Accused of Sexual Assault, Found Not Guilty and Accused Again*, THE BULL ELEPHANT, <http://thebullelephant.com/jmu-student-accused-rape-found-not-guilty-accused/> (2016).

16. *Id.*

There are just so many issues, and they are coming up in the courts, and they are making bad law. When I take a case, I always say, “I am in Texas, and we get bad law periodically, I do not want my name on bad law. I do not want to be a lawyer with my name on bad law.” We do not want these universities’ names on bad law. If I represent Middle Tennessee State University, I want to do everything I can to protect it, so it is not sued for unfair processes. But I also want to protect my students to make sure, more importantly, they get a fair process.

Even though the guidelines may vary, there is one thing that never varies, and that is the Constitution. I do not care what administration is in place, I do not care what rules they give us, due process is a fundamental component of fairness in our society. It is a constitutional promise.¹⁸ This is language taken directly from a recent case, *John Doe v. Brandeis*, “Like Harvard University, Brandeis appears to have substantially impaired if not eliminated accused students’ rights to a fair and impartial process and it is not enough simply to say such changes are appropriate because victims of sexual assault have not always achieved justice in the past. Whether someone is a ‘victim’ is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning. Each case must be decided on its own merits according to its own facts. If a college student is to be marked for life as a sexual predator it is reasonable to require that he be provided fair opportunity to defend himself and an impartial arbiter to make that decision. Put simply a fair determination of facts requires fair process not tilted to favor a particular outcome and a fair and neutral fact finder not predisposed to reach a particular conclusion.”¹⁹

Now, I have about three or four slides on this next case because I think it really captures the dilemma well. This comes from the Sixth Circuit, 2017, University of Cincinnati. These facts come directly from the opinion. “On September 6, 2015, University of Cincinnati students John Doe and Jane Roe, engaged in sex at John Doe’s apartment. John contends the sex was consensual, Jane claims it was not. No physical evidence supports either student’s version.”²⁰¹⁹ This is the quintessential case universities are grappling with. The “he said-she said” dilemma. Then comes the complicating factor that I am glad I do not have to deal with as a law professor that Title IX coordinators, unfortunately, do. “John Doe met Jane Roe on Tinder and after communicating for two or three weeks they met in person. Thereafter Doe invited Roe back to his apartment where the two engaged in sex, three weeks later Jane Roe reported to the University’s

17. KC Johnson, *Campus Sexual Assault Policies are Unfair to the Accused. This Case Shows How*, WASHINGTON POST, https://www.washingtonpost.com/opinions/campus-sexual-assault-policies-are-unfair-to-the-accused-this-case-shows-how/2017/08/16/2ab6781e-7de0-11e7-a669-b400c5c7e1cc_story.html?utm_term=.b1c41c805744 (2017).

18. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 603 (D. Mass. 2016).

19. *Id.* at 575.

¹⁹ *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 396 (6th Cir. 2017)

Title IX office that John Doe had sexually assaulted her that evening at his apartment. Five months later the University of Cincinnati cited Doe for violating student conduct, most specifically the university's policies against sex offenses, harassment, and discrimination.”

The University of Cincinnati resolves charges of non-academic misconduct through something they call an administrative review committee or an ARC. In this case, neither the Title IX officer who prepared the investigative report nor the accuser attended that hearing.²¹ Instead, Doe appeared before the ARC and provided his evidence. He was unable to pose questions to either the investigative officer or his accuser. His accuser's unsworn statement was read into the record. Doe was found responsible and received a two-year suspension from the University. He immediately appealed, and the school agreed to reduce the suspension to one year. Doe then sued the University in federal court. The District Court enjoined his suspension.

In this case, the ARC hearing committee was given the choice of believing either Jane Roe or the plaintiff, and, therefore, cross-examination was essential to due process. Now, the difficulty with cross-examination in these cases is there may be instances where the universities do not want the person who is traumatized, or otherwise vulnerable, from having to face their accuser. There are procedural protections to deal with that. For example, you can give questions to the hearing officer, and they can figure a way to present the question that may not be as aggressive, or even injurious, as cross-examination.

In this case, since the Title IX investigator did not show up at the hearing and the accuser did not show up, plaintiff had no right of any confrontation. The Sixth Circuit, not surprisingly, upheld the District Court's decision finding serious flaws in the procedures relied upon to find plaintiff responsible for sexual assault. The Circuit Court appeared most troubled by the lack of opportunity for cross-examination. This is the court's language: “The University of Cincinnati assumes cross-examination is beneficial only to Doe. In truth, the opportunity to question a witness and observe her demeanor while being questioned can be just as important to the trier of fact as it is to the accused. A decision relating to misconduct of the student requires a factual determination as to whether the conduct took place or not. The accuracy of that determination can be safeguarded by the sorts of procedural protections traditionally imposed under the due process clause. Few procedures safeguard accuracy better than adversarial questions in the case of competing narratives; cross-examination has always been considered the most effective way to ascertain truth.”²²

21. *Id.* at 397.

22. *Id.* at 401.

This, once again, emphasizes cross-examination, and the court says, “the greatest legal engine ever invented for the discovery of truth will do what it is meant to which is to: permit the fact finder to decide the litigants fate, to observe the demeanor of the witness in making a statement and aiding the fact finder in assessing credibility.”²³ That is what most of us would want if we had allegations raised against us. When a university’s procedures are insufficient to resolve issues of credibility and truth, it is clear the decisionmaker, the institution, risks reaching the wrong decision.

I want to also note that the court made it clear they were not unmindful of Jane Roe’s interest, and the extent to which it conflicted with John Doe’s interest. Roe and other alleged victims have a right to be heard and are entitled to expect that they may attend the University without the fear of sexual assault or harassment. This comes directly from the court’s opinion, “if they are assaulted and report the assault consistent with University procedures, they can also expect that the University of Cincinnati will promptly respond to their complaints. Setting aside the troubling facts that the University of Cincinnati’s Title IX office waited a month to interview Roe and it waited another four months to notify Doe of her allegations and yet another four months to convene the hearing, the concern at this point is that the University of Cincinnati’s inadequate procedures left the ARC’s decisions vulnerable to constitutional challenge.”²⁴ The court is letting the University of Cincinnati know it possibly failed two students: first, it failed the victim if she was assaulted and, second, it failed the accused by using unfair procedures to assess his guilt.

Another relevant case is *John Doe v. Columbia University*²⁵ from the Second Circuit. I am only going to be reading you footnote eleven because this footnote shows that courts are starting to appreciate schools’ actions under Title IX to change their policies and that change, in and of itself, can qualify as intentional discrimination. “It is worth noting furthermore that the possible motivations mentioned by the district court as more plausible than sex discrimination, including a fear of negative publicity or of Title IX liability, are not necessarily, as the district court characterized them, lawful motivations distinct from sex bias. A defendant is not excused from liability for discrimination because the discriminatory motivation does not result from a discriminatory heart, but rather from a desire to avoid practical disadvantages that might result from unbiased action. A covered university that adopts, even temporarily, a policy of bias favoring one sex over the other in a disciplinary dispute, doing so in order to avoid liability or bad publicity, has practiced sex discrimination, notwithstanding that the motive for the discrimination did not come from

23. *Id.* at 402.

24. *Id.* at 403.

25. *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016).

ingrained or permanent bias against that particular sex.”²⁶ You are starting to see more and more of these cases make their way through the courts.

Even the American Bar Association has weighed in on the issue and we know that when the ABA tackles an issue, it is important. Further, based on the ABA’s Task Force Report, we know this issue is not only difficult, it is divisive. The report I am going to discuss is not from the entire ABA, like the attorney guidelines relied upon by courts to determine whether someone acted in conformity with the Sixth Amendment. Instead, the ABA Criminal Justice section commissioned a Task Force on college due process rights and victim protections in November of 2016.²⁷ The Task Force voted unanimously in May of 2017 to endorse these recommendations for publication.²⁸ This report was published in June 2017 anticipating the Trump Administration’s approach to handling Title IX. I recommend all of you read the report. It is not that long. It is maybe fifteen pages. It is thoughtful. It is balanced. And, it may provide the most workable solution we have seen thus far.

What did the ABA Task Force recommend? One, we return back to the neutral terms “complainant” and “respondent,” rather than “victim,” “survivor,” and “perpetrator.”²⁹ Two, hearing panels should investigate both sides equally seeking out both inculpatory and exculpatory evidence.³⁰ In other words, make the hearing a truth-seeking process. Three, hearing panels should use the adjudicatory method, preferably with a diverse panel of three individuals rather than a single investigatory method.³¹

In no instance, however, does the Task Force think that the person who is the investigator should also be the hearing officer.³² Four, procedural protections should be robustly protected for both sides, including notice of the allegations, access to discovery, witness statements, and both sides having the right to appeal.³³ Fifth, while not endorsing a single evidentiary

26. *Id.* at 57 n.11.

27. ABA CRIMINAL JUSTICE SECTION TASK FORCE ON COLLEGE DUE PROCESS RIGHTS AND VICTIM PROTECTIONS: RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT, available at <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf> (last visited on April 3, 2018).

28. *Id.* n.1.

29. *Id.* at 2.

30. *Id.*

31. *Id.* at 3-4 (this approach is preferred because “it can offset any potential for investigator bias, and it allows the decision-maker(s) to hear live testimony from the parties”).

32. *Id.* at 3 (noting that “[i]t was the consensus of the Task Force that the single investigator model, which consists of having an investigator also serve as the decision-maker, carries inherent structural fairness risks especially as it relates to cases in which suspension or expulsion is a possibility”).

33. *Id.* at 4-5.

standard (i.e., preponderance of the evidence or clear and convincing evidence), the evidentiary standard is recommended to be a higher standard if there is only a single decision maker.³⁴ The Task Force is fine with what is the equivalent to preponderance of the evidence when a school utilizes a panel of three decision makers; but, if there is a single hearing officer the Task Force does not think the preponderance of the evidence standard is appropriate.³⁵ Sixth, live witnesses are preferred to paper statements, particularly if the witness's testimony is material.³⁶ Seventh, a record of the transcript should be made,³⁷ but again this raises FERPA issues; that is a different issue. Eighth, both parties should be permitted to ask questions or submit questions to be asked.³⁸

All of these recommendations are the result of compromise among experts in the field. Their hard work shows that serious people can create solutions when we strive to balance the important interests between complainants and accused. We owe it to the victims of sexual assault and harassment to get it right. We owe it to the accused to be fair in the process.

We are the lawyers. We owe it to our sons. We owe it to our daughters. We owe it to individuals who have been assaulted. And, we owe it to perpetrators who need to face justice.

We are the lawyers. A lot is expected of us, and we have to arrive at a fair solution. We need to follow the law, including basic concepts of justice such as notice and due process. We have to presume innocence. That is one of the seminal components of our judicial system. We should not allow funding needs to cloud our belief about what ensures a just and reliable result. For those of you that are working for schools, you have to realize we are teaching students what due process is, what justice is. If we are being motivated by this threat of losing our funding, we are losing our focus. Finally, we need to work toward eradicating the culture of silence and other institutional shortcomings that perpetuate sexual assault and harassment on campus.

Thank you very much.

34. *Id.* at 7-8.

35. *Id.*

36. *Id.* at 6.

37. *Id.*

38. *Id.*